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PREVENTING AN *EX MACHINA* FUTURE: SEARCH ENGINE SPEECH AND THE ADVISOR THEORY

LUKE PETTYJOHN*

Here's the weird thing about search engines. It was like striking oil in a world that hadn't invented internal combustion. Too much raw material. Nobody knew what to do with it . . . [T]hey were fixated on sucking it up and monetizing via shopping and social media. They thought that search engines were a map of what people were thinking. But actually they were a map of how people were thinking. Impulse. Response. Fluid. Imperfect. Patterned. Chaotic.¹

I. INTRODUCTION

This observation in the science fiction movie *Ex Machina*, allows Nathan, the CEO of a search engine company, to create artificial intelligence in a humanoid robot called Ava. Under the guise of winning an employee lottery, Nathan brings Caleb, “the most talented coder in [his] company,” to his remote estate.² Caleb’s task is to determine whether Ava “can truly think, and even feel, for herself. If so, she will represent . . . ‘the greatest scientific event in the history of man.’”³ Through a series of interviews, Ava demonstrates the mastery of her programming, which incorporated the search queries of every search engine user to mimic how a human would act. She plans her own escape and manipulates Caleb to help free her from

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¹ *EX MACHINA* (Film4 & DNA Films 2015).

² Anthony Lane, *Feelings: “Ex Machina” and “About Elly,”* NEW YORKER, (Apr. 13, 2015), <http://www.newyorker.com/magazine/2015/04/13/feelings-cinema-anthony-lane>.

³ *Id.* (quoting movie *EX MACHINA* (Film4 & DNA Films 2015)).

Nathan's controlling grasp. Though the movie contains other technological feats requiring a willing suspension of disbelief, such as Ava's hard drive/brain, accepting the rapidly growing power of search engines does not. The ending of *Ex Machina* may be clear, but the future of search engines and their influence on humanity remains clouded.

Twenty years ago, search engines performed the barest of functions. They compiled lists of "ten blue links" that were direct results of users' exact search criteria.⁴ There were no results that had been paid for by web sites.⁵ But by 2009, search engines had decided "people don't really want to search" like librarians browsing trays of index cards; they want quick access to the information they seek.⁶ Search engines thus began to "rank results based only on what the most relevant answers are for users."⁷ Search engines now tell us what we are really looking for, completing queries as we type, correcting typos, and "showing results for" what we actually intended to search.⁸ It does not require science fiction to see how the power of search engines, as protected by the First Amendment, is slipping beyond governmental control.

Courts and scholars have put forth two competing theories for categorizing the actions of search engines: the conduit theory and the editor theory.⁹ This Note attempts to outline a third, recently proposed theory of search, the advisor theory,¹⁰ to determine

⁴ Christopher Ratcliff, *10 Blue Links: Are They Alive or Dead in Search?*, ECONSULTANCY (Jan. 30, 2014), <https://econsultancy.com/blog/64228-10-blue-links-are-they-dead-or-alive-in-search/>.

⁵ *Id.*

⁶ *Id.*

⁷ Amit Singhal, *Setting the Record Straight: Competition in Search*, GOOGLE PUB. POL'Y BLOG (June 8, 2012), <http://googlepublicpolicy.blogspot.com/2012/06/setting-record-straight-competition-in.html>.

⁸ When attempting to search for "the mew yorker," Google will return with "Showing results for the *new* yorker" and give the user the opportunity to "search instead for" what was actually typed.

⁹ See James Grimmelman, *Speech Engines*, 98 MINN. L. REV. 868 (2014). Each theory will be addressed substantively in Part IV.

¹⁰ For a complete understanding of the advisor theory, see Grimmelman, *supra* note 9, which introduced the theory for the first time and applied it to search bias cases, but left open the opportunity to apply the theory to other First Amendment situations.

whether the actions of search engines are deserving of First Amendment protection. This piece ultimately suggests that courts must employ the advisor theory and begin to view search through the eyes of search users, rather than websites or search engines, when deciding whether search engine functions constitute protected speech.

Part II outlines the lineage of search engine speech from the early American newspaper industry through today. Part III introduces two of the most recent cases where the First Amendment acted to protect speech produced by search engines. Part IV describes the two theories that litigants have advanced to categorize the services that search engines provide, and explains their shortcomings. Part V introduces the more recently proposed advisor theory, explains how the theory would apply to the two cases introduced in Part III, and elaborates on the implications of a failure to adopt it.

II. THE LINEAGE OF SEARCH ENGINE SPEECH

A. *First Amendment Foundations of Search Engine Speech*

The First Amendment to the United States Constitution guarantees freedom of expression by prohibiting Congress from restricting the press or the rights of individuals to speak freely.¹¹ The First Amendment protections that search engine search results enjoy find their genesis in the newspaper industry as a result of editorial judgment.¹² The fact that editorial judgment concerns speech by the press, an institutional speaker, "was understood . . . at the time the First Amendment was ratified, for the press was even then seen as playing a systematic role in democratic society."¹³ As a general matter, "the Government may not interfere with the editorial judgments of private speakers on issues of public concern—that is, it may not tell a private speaker what to include or not to include in speech

¹¹ U.S. CONST. amend. I.

¹² Randall P. Bezanson, *The Developing Law of Editorial Judgment*, 78 NEB. L. REV. 754, 757 (1999).

¹³ *Id.*

about matters of public concern.”¹⁴ That rule is not however, “restricted to the press, being enjoyed by business corporations generally and by ordinary people engaged in unsophisticated expression as well as by professional publishers.”¹⁵ Further, First Amendment protections apply “whether or not a speaker articulates, or even has, a coherent or precise message, and whether or not the speaker generated the underlying content in the first place.”¹⁶

The Supreme Court chose to address the issue of governmental interference with the editorial judgment of a newspaper in *Miami Herald Publishing Co. v. Tornillo*.¹⁷ In that case, Tornillo, a candidate for the Florida House of Representatives, sought to force Miami Herald Publishing Company to print a reply to an editorial it had published that was critical of his candidacy.¹⁸ Tornillo based his claim on Florida’s “right of reply” statute that “grant[ed] a political candidate a right to equal space to answer criticism and attacks on his record by a newspaper, and ma[de] it a misdemeanor for the newspaper to fail to comply.”¹⁹ The Court held that while the statute “did not censor speech in the traditional sense,”²⁰ requiring newspapers to grant access to the message of others “imposed an impermissible content-based burden on newspaper speech.”²¹ Such a burden resulted because, in effect, the statute deterred newspapers “from speaking in unfavorable terms about political candidates” and “induced the newspaper to respond to the candidates’ replies when it might have preferred to remain silent.”²² Both prevented the news-

¹⁴ *Jian Zhang v. Baidu.com, Inc.*, 10 F. Supp. 3d 433, 437 (2014) (citing *Snyder v. Phelps*, 562 U.S. 443, 451–52 (2011)).

¹⁵ *Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 574 (1995).

¹⁶ *Jian Zhang*, 10 F. Supp. 3d at 437 (citing *Zalewska v. Cty. of Sullivan*, N.Y., 316 F.3d 314, 319 (2d Cir. 2003)).

¹⁷ 418 U.S. 241 (1974).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Zhang*, 10 F. Supp. 3d at 436.

²¹ *Turner Broad. Sys. Inc. v. FCC*, 512 U.S. 622, 653 (1994).

²² *Id.* at 654.

paper from exercising its First Amendment right to exercise "editorial control and judgment."²³

The Supreme Court reinforced and extended that principle beyond the newspaper context in *Hurley v. Irish-American Gay, Lesbian, & Bisexual Group of Boston*.²⁴ In *Hurley*, a group of individuals²⁵ "authorized by the city of Boston to organize and conduct the St. Patrick's Day-Evacuation Day Parade . . . refused a place in the 1993 event" to the Irish-American Gay, Lesbian, & Bisexual Group of Boston, a group that wished "to express its members' pride in their Irish heritage as openly gay, lesbian and bisexual individuals."²⁶ The issue was whether Massachusetts could "require private citizens who organize a parade to include among the marchers a group imparting a message the organizers do not wish to convey."²⁷ According to the Court, allowing the state to do so would "violate[] the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message."²⁸ The Court further explained, "'[S]ince all speech inherently involves choices about what to say and what to leave unsaid,' one important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say.'"²⁹ The Court found that principle applied "even though the parade organizers did not themselves create the floats and other displays that formed the parade and were 'rather lenient in admitting participants.'"³⁰ Further, a private speaker "does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the

²³ *Jian Zhang*, 10 F. Supp. 3d at 436 (quoting *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 258 (1974)).

²⁴ 515 U.S. 557 (1995).

²⁵ The group was the South Boston Allied War Veterans Council which was an unincorporated association of individuals elected from various veterans groups. *Id.* at 557.

²⁶ *Id.*

²⁷ *Id.* at 559.

²⁸ *Id.* at 573.

²⁹ *Id.* (quoting *Pac. Gas & Elec. Co. v. Pub. Util. Comm'n of Cal.*, 475 U.S. 1, 11, 16 (1986)).

³⁰ *Jian Zhang*, 10 F. Supp. at 437 (quoting *Hurley*, 515 U.S. at 569).

speech.”³¹ For that matter, “nor . . . does First Amendment protection require a speaker to generate . . . each item featured in the communication.”³²

B. Applying the First Amendment to Search Engine Speech

Few courts have been tasked with deciding the issue of whether search engine search results constitute speech.³³ The term “search results” typically refers to the list created by search engines in response to a query.³⁴ One of the very first cases that presented the issue was *Search King, Inc. v. Google Tech, Inc.*³⁵ In that case, Search King, a web site, brought an action for tortious interference with contractual relations against Google, which ranked web sites.³⁶ Search King alleged that Google maliciously decreased the ranking it had previously assigned to Search King.³⁷ The specific question at issue was “whether a representation of the relative significance of a web site as it corresponds to a search query is a form of protected speech.”³⁸ Search King asserted a single cause of action: tortious interference with contractual relations.³⁹ Both Search King and Google

³¹ *Hurley*, 515 U.S. at 569–70.

³² *Id.*

³³ At the time *Jian Zhang* was decided, “only two courts appear[ed] to have addressed the question, both concluding (albeit with somewhat sparse analysis) that search engine results are indeed protected by the First Amendment.” 10 F. Supp. 3d at 436 (citing *Langdon v. Google, Inc.*, 474 F. Supp. 2d 622 (D. Del. 2007); *Search King, Inc. v. Google Tech, Inc.*, No. CIV-02-1457-M, 2003 WL 21464568 (W.D. Okla. May 27, 2003)).

³⁴ *Search* *Result*, SEARCHMETRICS,
<http://www.searchmetrics.com/glossary/search-result/> (last visited Feb. 20, 2016).

³⁵ No. CIV-02-1457-M, 2003 WL 21464568 (W.D. Okla. May 27, 2003).

³⁶ *Id.* Google’s search ranking was “controlled by a mathematical algorithm. One component of Google’s mathematical algorithm produce[d] a ‘PageRank,’ . . . a numerical representation of the relative significance of a particular web site as it corresponds to a search query.” *Id.* Search King’s suit arose because its “PageRank” was reduced or devalued and, while Google did not sell PageRanks, the reduction of Search King’s “PageRank” led to a loss in its advertising revenue.

Id.

³⁷ *Id.*

³⁸ *Search King*, 2003 WL 21464568, at *1.

³⁹ *Id.* at *2.

conceded that the case turned on Search King's ability to demonstrate that "the interference was malicious and wrongful, and was not justified, privileged, or excusable."⁴⁰ Google asserted that its actions could not be considered wrongful because the rankings of pages⁴¹ constituted opinions protected by the First Amendment.⁴² To support that proposition, Google relied on *Jefferson County Sch. Dist. No. R-1 v. Moody's Investor's Services, Inc.*,⁴³ a case holding that "First Amendment protection extended to a financial rating service's unfavorable review of the value of a school district's refunding bonds."⁴⁴ The court found the *Jefferson County* case analogous to the case at hand and ultimately held that the rankings of pages were "subjective result[s]" that constituted "constitutionally protected opinions" "entitled to full constitutional protection."⁴⁵

Four years later, *Langdon v. Google, Inc.*⁴⁶ was decided. In that case, the District Court for the District of Delaware "refused to order Google and Microsoft to prominently list [Langdon's] site in their search results."⁴⁷ Langdon, the plaintiff, owned two websites: www.NCJusticeFraud.com and www.ChinalsEvil.com.⁴⁸ The purpose of the first was to "expose[] fraud perpetrated by various North Carolina government officials and employees, including . . . the North Carolina Attorney General . . ."⁴⁹ The second website was intended to "delineate[] atrocities committed by the Chinese government."⁵⁰ Langdon's complaint alleged that the search engine defendants refused to run ads on his sites and that this violated his First Amend-

⁴⁰ *Id.*

⁴¹ In that case, the search results came in the form of PageRanks, a component of the larger search engine's mathematical algorithm, which is a "numerical representation of the relative significance of a particular web site as it corresponds to a search query." *Id.* at *1.

⁴² *Id.*

⁴³ 175 F.3d 848 (10th Cir. 1999).

⁴⁴ *Search King*, 2003 WL 21464568, at *2 (citing *id.* at 852-55).

⁴⁵ *Id.* at *4; Eugene Volokh & Donald M. Falk, *Google: First Amendment Protection for Search Engine Results*, 8 J.L. ECON. & POL'Y 883 (2012).

⁴⁶ 474 F. Supp. 2d 622 (D. Del. 2007).

⁴⁷ Volokh & Falk, *supra* note 45, at 886.

⁴⁸ *Langdon*, 474 F. Supp. 2d at 626.

⁴⁹ *Id.*

⁵⁰ *Id.*

ment rights, *inter alia*.⁵¹ For relief, Langdon sought to have the defendants place his ads for his websites “in prominent places on their search engine results and . . . ‘honestly’ rank [his] websites.”⁵² Google argued that “such relief would compel it to speak in a manner deemed appropriate by [Langdon] and would prevent Google from speaking in ways that [he] dislikes.”⁵³ The court reasoned: “The First Amendment guarantees an individual the right to free speech, ‘a term necessarily comprising the decision of both what to say and what not to say.’ . . . [T]he injunctive relief sought by Plaintiff contravenes Defendants’ First Amendment rights.”⁵⁴ Harking back to the protections afforded newspapers⁵⁵ the court held that “search engines cannot be forced to include links that they wish to exclude.”⁵⁶

III. RECENT LITIGATION: THE CONTEXT AND CHARACTERS

A. Jian Zhang v. Baidu.com, Inc.

In *Jian Zhang v. Baidu.com Inc.*,⁵⁷ “a group of New York residents who advocate for increased democracy in China sue[d] one of China’s largest companies, Baidu, Inc. (‘Baidu’).”⁵⁸ The plaintiffs in that case contended that Baidu unlawfully blocked “articles and other information concerning ‘the Democracy movement in China’” and related topics from its search results in the United States.⁵⁹ The Southern District of New York concluded that, at least in the present circumstances, the First Amendment protects as speech the results produced by an Internet search engine.⁶⁰

⁵¹ *Id.*

⁵² *Id.* at 629.

⁵³ *Id.*

⁵⁴ *Id.* at 629–30; Volokh & Falk, *supra* note 45, at 886.

⁵⁵ See *supra* Part II.A.

⁵⁶ Volokh & Falk, *supra* note 45, at 886 (citing *Langdon*, 474 F. Supp. 2d at 630).

⁵⁷ 10 F. Supp. 3d 433 (S.D.N.Y. 2014).

⁵⁸ *Id.* at 434.

⁵⁹ *Id.* at 434–35 (citing Compl. (Docket No. 1) ¶¶ 14, 22, 2011 WL 1884450 (S.D.N.Y.)).

⁶⁰ *Id.* at 435.

Baidu operates a Chinese search engine service called Baidu.com.⁶¹ Baidu.com “offers multiple services to locate information, products and services using Chinese-language search terms, such as, search by Chinese phonetics, advanced search, snapshots, spell checker, stock quotes, news, images, video, weather, train and flight schedules and other local information.”⁶² Baidu was purported to be the largest search engine in China, “with an estimated more than 70% share of the Chinese-language market” as of 2010.⁶³

Plaintiffs were “self-described ‘promoters of democracy in China through their writings, publications and reporting of pro-democracy events.’”⁶⁴ They alleged that Baidu “conspire[d] to prevent ‘pro-democracy political speech’ from appearing in its search-engine results here in the United States.”⁶⁵ Each plaintiff had published “articles, video recordings, audio recordings, or other publications regarding the democracy movement in China” on the Internet.⁶⁶ The publications appeared in the search results of other search engines, such as Google and Bing, but did “not appear in Baidu’s search results because Baidu deliberately block[ed] them.”⁶⁷ As a result, the plaintiffs brought eight different claims against Baidu.⁶⁸

In its analysis, the court noted that the question of “whether search-engine results constitute speech protected by the First Amendment has been the subject of vigorous academic debate.”⁶⁹ It is a subject, however, that has received “relatively little attention”

⁶¹ *Id.*

⁶² *Id.* (citing Compl. ¶ 13).

⁶³ *Id.* (citing *Baidu, Inc. v. Registers.com, Inc.*, 760 F. Supp. 2d 312, 314 (S.D.N.Y. 2010)).

⁶⁴ *Id.*

⁶⁵ *Id.* (citing Compl. ¶¶ 7-8, 10-12, 14-16, 20).

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ 10 F. Supp. 3d 433 (S.D.N.Y. 2014) (citing Compl. ¶¶ 7-8, 10-12, 14-16, 20).

⁶⁹ *Id.* at 436 (citing Grimmelmman, *supra* note 9; Stuart Minor Benjamin, *Algorithms and Speech*, 161 U. PA. L. REV. 1445 (2013); Josh Blackman, *What Happens if Data Is Speech?*, 16 U. PA. J. CONST. L. ONLINE 25 (2014)); Oren Bracha & Frank Pasquale, *Federal Search Commission? Access, Fairness, and Accountability in the Law of Search*, 93 CORNELL L. REV. 1149 (2008); Volokh & Falk, *supra* note 45; Tim Wu, *Machine Speech*, 161 U. PA. L. REV. 1495 (2013); Michael J. Ballanco, Comment, *Searching for the First Amendment: An Inquisitive Free Speech Approach to Search Engine Rankings*, 24 GEO. MASON U. C.R.L.J. 89 (2013).

from courts.⁷⁰ In fact, “only two courts appear[ed] to have addressed the question, both concluding (albeit with somewhat sparse analysis) that search engine results are indeed protected by the First Amendment.”⁷¹ Further, the question was one of first impression in that circuit.⁷²

Looking to *Tornillo* and *Hurley*,⁷³ the court found that, in light of the principles established therein, “there is a strong argument to be made that the First Amendment fully immunizes search-engine results from most, if not all, kinds of civil liability and government regulation.”⁷⁴ The court expanded on this point:

[By] retriev[ing] relevant information from the vast universe of data on the Internet and [organizing] it in a way that would be most helpful to the searcher . . . search engines inevitably make editorial judgments about what information (or kinds of information) to include in the results and how and where to display that information (for example, on the first page of the search results or later).⁷⁵

In those respects, the court reasoned: “[A] ‘search engine’s editorial judgment is much like many other familiar editorial judgments,’ such as the newspaper editor’s judgment of which wire-service stories to run and where to place them in the newspaper.”⁷⁶ The court also likened search engine editorial judgments to “the guidebook writer’s judgments about which attractions to mention and how to display

⁷⁰ *Id.*

⁷¹ *Id.* (referring to *Langdon v. Google, Inc.*, 474 F. Supp. 2d 622 (D. Del. 2007) and *Search King, Inc. v. Google Tech., Inc.*, No. CIV-02-1457-M, 2003 WL 21464568 (W.D. Okla. May 27, 2003)).

⁷² *Id.*

⁷³ See *supra* Part II.

⁷⁴ *Jian Zhang*, 10 F. Supp. 3d at 438 (citing Benjamin, *supra* note 69, at 1458–72; Volokh & Falk, *supra* note 45, at 884–92).

⁷⁵ *Id.* (citing Eric Goldman, *Search Engine bias and the Demise of Search Engine Utopianism*, 8 YALE J.L. & TECH. 188, 192 (2006) (concluding that “search engines make editorial judgments just like any other media company”)).

⁷⁶ *Id.* (citing Volokh & Falk, *supra* note 45, at 884; Benjamin, *supra* note 45, at 1467–71).

them, and Matt Drudge's judgments about which stories to link and how prominently to feature them."⁷⁷

But the fact that search engines "often collect and communicate facts, as opposed to opinions," had no bearing on the court's analysis.⁷⁸ Rather, it based its rationale firmly on Supreme Court precedent, noting "[T]he creation and dissemination of information are speech within the meaning of the First Amendment. Facts, after all, are the beginning point for much of the speech that is most essential to advance human knowledge and conduct human affairs."⁷⁹

The court also found the argument "that search-engine results may be produced algorithmically" to be unpersuasive for its analysis.⁸⁰ "After all, the algorithms themselves were written by human beings" and "inherently incorporate the search engine company engineers' judgments about what material users are most likely to find responsive to their queries."⁸¹ Ultimately, the court was heavily persuaded by the argument that "what is true for parades and newspaper op-ed pages is at least as true for search engine output."⁸² That is so because "when search engines select and arrange others' materials, and add the all-important ordering that causes some materials to be displayed first and others last, they are engaging in fully protected First Amendment expression - '[t]he presentation of an edited compilation of speech generated by other persons.'"⁸³

The court also declined to extend⁸⁴ *Turner Broad. Sys., Inc. v. FCC*,⁸⁵ to the case before it.⁸⁶ In that case, cable television operators and programmers challenged the constitutionality of the "must-carry" provisions of the Cable Television Consumer Protection and Competition Act of 1992 that required local broadcast stations to be

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* (citing *Sorrell v. IMS Health Inc.*, --- U.S. ---, 131 S. Ct. 2653, 2667 (2011)).

⁸⁰ *Id.*

⁸¹ *Id.* at 438-39.

⁸² *Id.* at 439.

⁸³ *Id.* (citing *Volokh & Falk*, *supra* note 45, at 891 (quoting *Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 570 (1995))).

⁸⁴ Nor did the plaintiffs in this case cite to it. *Id.*

⁸⁵ 512 U.S. 622 (1994).

⁸⁶ *Jian Zhang*, 10 F. Supp. 3d at 439.

carried on cable systems.⁸⁷ In that context, the Supreme Court “applied only intermediate scrutiny.”⁸⁸ The court in this case found significant that the Supreme Court in *Turner* started its analysis by stating that “[t]here can be no disagreement on an initial premise’: that cable operators, ‘by exercising editorial discretion over which stations or programs to include in its repertoire’ – that is, by exercising editorial discretion over speech created by others – themselves ‘engage in and transmit speech’ protected by the First Amendment.”⁸⁹ However, the Court in *Turner* held that an intermediate level of scrutiny was appropriate for three reasons: First, the Court found that the cable operators were nothing more than “conduit[s] for the speech of others, transmitting it on a continuous and unedited basis to subscribers;”⁹⁰ second, the cable operators could choose to preclude some speakers, “giv[ing] rise to the Government’s interest in limiting monopolistic autonomy in order to allow for the survival of broadcasters who might otherwise be silenced and consequently destroyed;”⁹¹ and third, because the regulations at issue did not “impose[] a restriction, penalty, or burden by reason of the views, programs, or stations the cable operator has selected or will select,”⁹² they were content neutral.⁹³ Thus, while the Court acknowledged “that the cable operators were engaged in speech,” it “granted lesser protection to that speech because of its less expressive nature.”⁹⁴

Perhaps not considering that the court would follow the editorial judgment line of analysis rather than *Turner*’s three-prong analysis, the plaintiffs did not realize that the theory of their claims would be fatal. The plaintiffs in *Zhang* claimed that, “Baidu exercise[d] editorial control over its search results on certain political topics---namely, by disfavoring expression concerning the Democra-

⁸⁷ *Turner*, 512 U.S. at 622–24.

⁸⁸ *Jian Zhang*, 10 F. Supp. 3d at 439.

⁸⁹ *Id.* (quoting *Turner*, 512 U.S. at 636).

⁹⁰ *Turner*, 512 U.S. at 629.

⁹¹ *Hurley v. Irish American Gay, Lesbian, and Bisexual Grp. of Boston*, 515 U.S. 557, 577 (2011).

⁹² *Turner*, 512 U.S. at 644.

⁹³ *Jian Zhang*, 10 F. Supp. 3d at 439.

⁹⁴ *Id.* at 439.

cy movement in China and related subjects.”⁹⁵ The court framed the plaintiffs’ argument as “seek[ing] to hold Baidu liable for, and thus punish Baidu for, a conscious decision to design its search-engine algorithms to favor certain expression on core political subjects over other expression on those same political subjects.”⁹⁶ It is for this very reason that the court dismissed the suit, holding that “to allow such a suit to proceed would plainly ‘violate[] the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message.’”⁹⁷ The court found this conclusion to be “compelled as much by *Turner* as it is by *Tornillo* and *Hurley*.”⁹⁸ The plaintiffs’ claims failed under *Turner* because “[t]here [could] be no disagreement’ that Baidu [was] ‘engage[d] in and transmit[ed] speech’ and [was] thus ‘entitled to the protection of the speech and press provisions of the First Amendment.’”⁹⁹ The court found that to be true because the plaintiffs’ “own theory [was] that the company exercise[d] editorial discretion over its search results and thereby” sought to “communicate messages on a wide variety of topics and in a wide variety of formats.”¹⁰⁰

The court further found “*Turner*’s three principal rationales for applying a lower level of scrutiny to the must-carry cable regulations” to be inapplicable in the case before it.¹⁰¹ Regarding the first, “whether any search engine is a mere ‘conduit’ given the judgments involved in designing algorithms to choose, rank, and sort search results” was a matter of some debate.¹⁰² Since the plaintiffs’ “own allegations of censorship [made] clear that Baidu was ‘more than a passive receptacle or conduit for news, comment, and advertising,’” by alleging Baidu “purposely designs its search engine algorithms to exclude any pro-democracy topics, articles, publications, and multi-

⁹⁵ *Id.* at 440 (internal citations omitted).

⁹⁶ *Id.*

⁹⁷ *Id.* (citing *Hurley*, 515 U.S. at 573).

⁹⁸ *Id.*

⁹⁹ *Id.* (citing *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 636 (1994)).

¹⁰⁰ *Id.* (internal citations omitted).

¹⁰¹ *Id.*

¹⁰² *Id.* (citing Volokh & Falk, *supra* note 45, at 898–99).

media coverage," the court had no trouble finding their claim "not apt here."¹⁰³

Regarding the second *Turner* rationale, the court found search engine operators to "lack the physical power to silence anyone's voices, no matter what their alleged market share may be."¹⁰⁴ Again, the plaintiffs shot themselves in the foot, this time with their own publications which "[made] clear Baidu does not have the ability to block 'pro-Democracy' writings from appearing on the Internet in this country altogether; it can only control whether it will help users find them."¹⁰⁵ For that matter, "if a user is dissatisfied with Baidu's search results, he or she 'has access, with just a click of the mouse, to Google, Microsoft's Bing, Yahoo! Search, and other general purpose search engines, as well as to almost limitless other means of finding content on the Internet.'"¹⁰⁶ The plaintiffs acknowledged this in their complaint, stating that their "pro-democracy works are widely available to the public on the Internet 'via any of the [well-known] search engines such as Google, Yahoo, and Bing.'"¹⁰⁷

Turner's third rationale for applying intermediate scrutiny however, is what "put[] the final nail in the coffin" for the plaintiffs in this case.¹⁰⁸ In contrast with *Turner*, where the regulations at issue were found to be content neutral, the plaintiffs in this case "call[ed] upon the Court to impose a penalty on Baidu precisely because of what it does and does not choose to say."¹⁰⁹ The court held that "to hold Baidu liable for its editorial judgments would contravene the principle upon which '(o)ur political system and cultural life rest': 'that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence.'"¹¹⁰ The court found the plaintiffs' arguments to the contrary "wholly unpersuasive."¹¹¹

¹⁰³ *Id.* at 441 (citing *Hurley*, 515 U.S. at 575).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Zhang*, 10 F. Supp. 3d at 441 (citing *Volokh & Falk*, *supra* note 45 at 898).

¹⁰⁷ *Id.* (citing Compl., 2011 WL 1884450 (S.D.N.Y.)).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* (quoting *Turner*, 512 U.S. at 641).

¹¹¹ *Id.*

First, the plaintiffs asserted in a wholly conclusory manner that Baidu wasn't speaking, but instead "engaging in discriminatory conduct."¹¹² Again however, the court found this assertion to be belied by the plaintiffs' "own theory of the case, which [was] that by exercising editorial discretion, Baidu favor[ed] some 'political speech' over other 'political' speech."¹¹³ Worse still, the court found the plaintiffs' argument to be "indistinguishable from the argument rejected in *Hurley*."¹¹⁴ Just as in *Hurley*, "once the expressive character' of Baidu's search results '[were] understood, it [became] apparent' that allowing Plaintiffs to sue Baidu based on the content of those results would have 'the effect of declaring [Baidu's] speech itself to be the public accommodation.'"¹¹⁵

B. S. Louis Martin v. Google

More recently and far more tersely, a California state court in San Francisco similarly found Google's search results to be constitutionally protected activity.¹¹⁶ In *S. Louis Martin v. Google*,¹¹⁷ the owner of CoastNews.com sued Google claiming search bias, namely, that other search engines listed his website "among the top results on searches for topics his site covers, such as restaurant guides for neighborhoods in San Francisco," yet similar searches on Google didn't list his site at all.¹¹⁸ According to Martin, this made competition against Google's advertisers impossible.¹¹⁹ Martin also alleged that, after successfully signing up with Google's ad service, AdSense, the ads for a nudist retreat he placed on his site stopped displaying because Google believed the photographs in the ad were porno-

¹¹² *Id.* (citing Compl., 2011 WL 1884450 (S.D.N.Y.)).

¹¹³ *Zhang*, 10 F. Supp. 3d at 441.

¹¹⁴ *Id.* at 442.

¹¹⁵ *Id.* (citing *Hurley*, 515 U.S. at 572-73).

¹¹⁶ *S. Louis Martin v. Google*, Case No. CGC-14-539972 (November 13, 2014).

¹¹⁷ *Id.*

¹¹⁸ Beth Winegarner, *Google's Search Result, Ads Are Protected Speech: Judge*, LAW360 (Nov. 13, 2014, 3:23 PM), <http://www.law360.com/articles/596066/google-s-search-results-ads-are-protected-speech-judge>.

¹¹⁹ *Id.*

graphic.¹²⁰ Google filed an anti-SLAPP (anti-strategic lawsuit against public participation) motion in response.¹²¹ According to Google's memo in support of its motion to strike, "the anti-SLAPP statute was specifically enacted to prevent meritless suits such as this from chilling the exercise of the constitutional right of free speech."¹²² The memo argued that Martin's claims arose "from Google's exercise of its constitutionally protected free speech rights," where "Google's search result order and ad placement opinions are [the] constitutionally protected speech."¹²³ To support that proposition, Google relied on *Zhang, Langdon, and Search King*, and further analogized those cases to *Blatty v. N.Y. Times Co.*¹²⁴ In *Blatty*, the California Supreme Court did not allow a book publisher to sue the New York Times for excluding it from the best-seller list because "the creation of the best-seller list was expression protected under the First Amendment."¹²⁵ Relying on that notion, Google claimed that its "search results express Google's opinion on which websites are most likely to be helpful to the user in response to a query and are thus fully protected by the First Amendment."¹²⁶ Google further claimed that its "decisions as to whether or not to place advertisements on a particular website also involve editorial discretion and are thus fully protected by the First Amendment."¹²⁷ To bolster this claim, Google argued that Martin's "complaint itself demonstrate[d] that Google's conduct at issue . . . took place in a public forum and [was] connected with issues of public interest." Martin had alleged that Google, "by exercising its right to choose where it places third-party advertise-

¹²⁰ *Id.*

¹²¹ *S. Louis Martin v. Google*, Case No. CGC-14-539972 (June 17, 2014). California's anti-SLAPP statute provides for a special motion to strike a complaint where the complaint arises from activity exercising the right of free speech. CAL. CIV. PROC. CODE § 425.16 (West 2015).

¹²² See Defendant's Memo of Points and Authorities ISO Mot. To Strike Complaint, *Martin v. Google* (2014), (No. CGC-14-539972), 2014 WL 6478945.

¹²³ *Id.*

¹²⁴ 42 Cal. 3d 1033, 1048 (1986).

¹²⁵ Defendant's Memo of Points and Authorities ISO Mot. To Strike Complaint, *Martin v. Google* (2014), (No. CGC-14-539972), 2014 WL 6478945. Case No. CGC-14-539972.

¹²⁶ *Id.*

¹²⁷ *Id.*

ments on websites such as [Martin's] is engaging in a 'holy war against certain words.'"¹²⁸ Google argued that the opposite in fact is true because Martin's suit sought "to alter Google's speech so that [Martin's] own interests [were] served rather than those of Google users."¹²⁹ The court agreed with Google's assertion that Martin's suit "challenge[d] Google's constitutionally protected speech,"¹³⁰ "thereby shifting the burden to [Martin] to demonstrate a probability of prevailing on the merits of the Complaint," which he failed to do.¹³¹

IV. A GROWING THREAT: THE FAILURE OF THE CURRENT THEORIES

Historically, there have been two competing theories advanced to categorize search engines and the services they provide: the conduit theory and the editor theory.¹³² While proponents of each theory claim to have users' interests at heart, neither side can come to any agreement over how best to help them.¹³³ Ironically, those "who start off talking about what would be best for users find themselves drawn . . . to one of these decidedly non-user-centric theories of search."¹³⁴ Accordingly, before presenting the advisor theory as a possible solution and showing how it would apply in practice, it is important to delineate the "implicit assumptions made by these other theories."¹³⁵

A. *The Conduit Theory*

The conduit theory argues that search engines exist "to carry the speech of others,"¹³⁶ they have "little or no speech interest[s] of [their] own."¹³⁷ The conduit theory favors objectivity and "focuses

¹²⁸ *Id.* (citing Compl. ¶ 7).

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ Order Granting Defendant Google, Inc. to Strike Plaintiff's Complaint Pursuant to Civ. Proc. Code § 425.16.

¹³² See Grimmelmann, *supra* note 9, at 879.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

on what the search *does*.”¹³⁸ Individual websites rely on the conduit theory to argue that, since search engines “exist[] to help speakers reach audiences,” the law should prevent search engines from prejudicially using their power to censor websites.¹³⁹ Because it looks at search from the eyes of individual websites, the conduit theory sees search engine bias as inherently evil, as it “systematically and unfairly discriminate[s] against certain individuals or groups of individuals in favor of others.”¹⁴⁰ It is exactly this bias, however, on which the editor theory relies.

B. The Editor Theory

The editor theory argues that “search engines are ‘media companies’ that make ‘editorial choices’ about what to publish.”¹⁴¹ It views search through the eyes of the search engine, favors subjectivity, and focuses “on what search says.”¹⁴² Just as Yahoo! claimed in 2009 that “people don’t really want to search,”¹⁴³ a Google engineer stated in 2011 that “in some sense when people come to Google, that’s exactly what they’re asking for – our editorial judgment.”¹⁴⁴ And that is what the editor theory relies on: the view that search results are “‘editorial judgments’ about which websites might be of interest to users.”¹⁴⁵

Under the editor theory, search engines are without a doubt speakers because they: (1) convey information that they have prepared or compiled; (2) “direct users to material created by others, by

¹³⁶ *Id.* at 881.

¹³⁷ *Id.* at 889.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 884 (quoting Batya Friedman & Helena Nissenbaum, *Bias in Computer Systems*, 14 ACM TRANSACTIONS ON INFO. SYS. 330, 332 (1996)).

¹⁴¹ *Id.* at 885 (quoting Eric Goldman, *Search Engine Bias and the Demise of Search Engine Utopianism*, 8 YALE J.L. & TECH. 188, 189 (2006)).

¹⁴² *Id.* at 889.

¹⁴³ Ratcliff, *supra* note 4.

¹⁴⁴ *Id.* at 885 (quoting Steven Levy, *TED 2011: The ‘Panda’ that Hates Farms: A Q&A with Google’s Top Search Engineers*, WIRED NEWS (Mar. 3, 2011, 1:36 PM), <http://www.wired.com/business/2011/03/the-panda-that-hates-farms/all/>).

¹⁴⁵ *Id.*

referencing the titles of Web pages that the search engines judge to be most responsive to the query, coupled with short excerpts from each page;" and (3) "select and sort the results in a way that is aimed at giving users what the search engine companies see as the most helpful and useful information."¹⁴⁶ The third distinction is the most valuable of the three because it "is how each search engine company tries to keep users coming back to it rather than to its competitors."¹⁴⁷ Eugene Volokh states that the "selection and sorting is a mix of science and art" because, while "sophisticated computerized algorithms" are employed, the "algorithms themselves inherently incorporate the search engine company engineers' judgments about what material users are most likely to find responsive to their queries."¹⁴⁸ For this reason, Volokh claims that search engine editorial judgment is analogous to "many other familiar editorial judgments," such as newspapers, guidebooks, and compilation news websites such as DrudgeReport.com, because each must decide "[o]ut of the thousands of possible items that could be included, which to include, and how to arrange those that are included."¹⁴⁹ Volokh claims that these "judgments are all, at their core, editorial judgments about what users are likely to find interesting and valuable. And all these exercises of editorial judgment are fully protected by the First Amendment."¹⁵⁰ Accordingly, in search bias cases, when "the conduit theory [meets] the editor theory, . . . the editor theory [wins]."¹⁵¹ But both the conduit and editor theories view search through a distorted lens; they fail to consider what search looks like through the eyes of the user.

V. A NEW HOPE: THE ADVISOR THEORY

To consider search through the eyes of the user, a new approach must be employed. Though the conduit and editor theories

¹⁴⁶ Eugene Volokh & Donald M. Falk, *Google: First Amendment Protection for Search Engine Search Results*, 8 J.L. ECON. & POL'Y 883, 884 (2012).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 885.

¹⁵⁰ *Id.*

¹⁵¹ Grimmelman, *supra* note 9, at 911.

"differ on the details," both are speaker-centric, attempting to "identify the best information sources and make sure they can be heard through the cacophony."¹⁵² The conduit theory is concerned that "valuable and deserving speakers will be drowned out unless they have [the] search engines' help," and the editor theory "sets up search engines as experts in identifying the best and most useful information."¹⁵³ Both "try to solve the problem of noise by amplifying good speech."¹⁵⁴ But search is "the single most listener-directed" way that speakers and listeners can find each other.¹⁵⁵ Accordingly, an alternate approach to categorizing speech must be employed to effectively consider search through the eyes (or ears) of the user: the advisor theory.

A. *The Advisor Theory*

Unlike newspapers, radios, and televisions, search engines are interactive.¹⁵⁶ Their results are not pre-programmed but "generated 'on the fly,' in response to a user's specific query."¹⁵⁷ Having performed one search, a user may use a search engine to perform another related search, refining the query "by entering modified or additional keywords, seeing how this changes the results."¹⁵⁸ Once satisfied with the results, the user "goes off to a website or websites to attend to their speech."¹⁵⁹ In this way, "search results are advice: suggestions about which websites the user should consult."¹⁶⁰ Viewing search results as suggestions or advice combines the two main goals of the conduit and editor theories: the connecting of websites and users via search engines expressing judgments about those websites.¹⁶¹ Viewing search through the eyes of the user suggests that

¹⁵² *Id.* at 894.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 895.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

the conduit and editor theories are not actually in opposition, but rather two sides of the same coin.¹⁶² "Search engines connect websites and users *by* expressing judgments about websites."¹⁶³ This suggests that search engines should be characterized as "helpful, trustworthy *advisor[s]*."¹⁶⁴

The advisor theory puts users' interests first and "defers to users' choices in defining those interests."¹⁶⁵ It does not focus on *what* search *does* or *says*, but *how* users search. Under the advisor theory, users are active listeners.¹⁶⁶ Putting the users' interests first promotes autonomy.¹⁶⁷ Users are able to "choose appropriate actions for achieving [their] goals," which supports the fundamental right to "seek" information.¹⁶⁸ This seeking does not involve "mere access to raw information, but also the ability to sort through it."¹⁶⁹ The conduit and editor theories are handicapped by their reliance on the websites and search engines "to know what is best for [the] users."¹⁷⁰ The advisor theory understands that "users themselves are better placed to know what they want and need than anyone else is."¹⁷¹ To further support autonomy, users' goals, along with the means to pursue them, must be self-chosen.¹⁷² Accordingly, access to information sought is of paramount importance to autonomy because informational equality, diversity, and efficiency all stem from it.¹⁷³ To support this end, the advisor theory advocates for increased access and loyalty to users from search engines.¹⁷⁴

Access necessarily requires the law to promote it.¹⁷⁵ Regulation, however, can threaten access.¹⁷⁶ Consider, for example, that

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 896.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 896-97.

¹⁶⁹ *Id.* at 897.

¹⁷⁰ *Id.* at 898.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 901.

¹⁷⁵ *Id.*

because holocaust denial is prohibited in Germany and insulting the king is prohibited in Thailand, "Google frequently removes links to these and many other kinds of content when ordered to do so by local authorities."¹⁷⁷ Such removal "directly inhibit[s] users' ability to seek out the information they seek."¹⁷⁸ When Baidu is required by the Chinese government to block particular searches, it interferes with basic preconditions of certain types of freedom.¹⁷⁹ Regulation that limits a search engine's use "potentially degrades the quality of advice users receive."¹⁸⁰ But regulation has its benefits as well; "the government [can] take steps to ensure that users are affirmatively able to make use of good and diverse search engines, helping to provide them if the market falls short."¹⁸¹ Accordingly, to ensure access, regulation is a necessary evil with both positive and negative implications.

Loyalty also involves regulation, but it focuses on the relationship between users and search engines rather than the conduct of the search engine.¹⁸² James Grimmelman describes this relationship as "an inescapable information asymmetry."¹⁸³ He explains, "[T]he user knows more about what she wants, . . . but the search engine knows far more about whether anyone has put [the relevant content] online."¹⁸⁴ The result is "a distinctive possibility for disloyalty."¹⁸⁵ Consider Grimmelman's example:

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 901–02. For example, "Baidu blocks searches for information on Falun Gong," a Chinese spiritual practice, "at the Chinese government's behest" because the Communist Party views it as a potential threat due to its size, independence from the state, and spiritual teachings. *Id.* (citing Ed Felten, *Chinese Internet Censorship: See It for Yourself*, FREEDOM TO TINKER (Apr. 28, 2009), <https://freedom-to-tinker.com/blog/felten/chinese-internet-censorship-see-it-yourself/>; see also Seth Faison, *In Beijing: A roar of Silent Protestors*, N.Y. TIMES, Apr. 27, 1999), <http://www.nytimes.com/1990/04/27/world/in-beijing-a-roar-of-silent-protestors.html>.

¹⁸⁰ Grimmelman, *supra* note 9, at 902.

¹⁸¹ *Id.*

¹⁸² *Id.* at 903.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

If I search for [discount dingos] and the search engine tells me about OtterWorld and CapybaraCentral but not DingoMart, it has frustrated my dingo-related goals. Perhaps worse, if the search engine directs me to DingoBarn because it earns an undisclosed 5% commission on referrals, it has abused my trust to enrich itself. It is precisely because the search engine knows more than I do about websites that it can hide what it knows from me, or deliberately steer me to sites that serve its goals, not mine.¹⁸⁶

This shows how "[t]he asymmetry is hard-wired into search."¹⁸⁷ The reliance on the search engine leaves the user susceptible to deception. Under the advisor theory, the law can, however, "step in to ensure [loyalty]" by "taking action against search engines that deceive or manipulate, or coerce users."¹⁸⁸

B. Preventing an Ex Machina Future

Currently, the power of search engines, as protected by the First Amendment, is rapidly advancing beyond governmental control. This is due in large part to the fact that search engines are more and more regularly able to rely on the editor theory, or editorial judgment, to protect their actions.¹⁸⁹ Under the editor theory, where relevance to the user is subjectively determined by the search engine, the search engine cannot produce false results.¹⁹⁰ As such, courts like those in *Search King* and *S. Louis Martin*, will continue to "conflate[] users' normative opinions about websites with search engines' descriptive opinions about which websites users will find relevant."¹⁹¹ Distinguishing between these two different types of

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ See *supra* Part IV.

¹⁹⁰ Grimmerman, *supra* note 9, at 924. Contrast this with the conduit theory, which "regularly assert[s] that rankings are falsifiable because relevance is objective." *Id.* at 923.

¹⁹¹ *Id.* at 924.

opinions is important because "the two kinds of opinions are protected speech for different reasons and to very different extents."¹⁹²

Normative opinions of users "are protected speech because we have decided as a society to treat matters of taste and value as questions of individual conscience rather than objective agreement."¹⁹³ This notion "respects personal autonomy while promoting social pluralism."¹⁹⁴ Freedom of expression for descriptive purposes, however, "is an instrumental goal: it helps encourage the creation of better and more accurate knowledge about the world."¹⁹⁵ Search rankings fall into the latter category which "enjoy only . . . weaker, more contingent protections."¹⁹⁶ The advisor theory is able to filter and distinguish between these two types of opinions to arrive at a more exacting result. The current champion of the courts, the editor theory, cannot filter and distinguish, but must resort to believing that the search engine's opinion of relevance is infallible and thus entitled full First Amendment protections.

However, were a court to revisit *S. Louis Martin*¹⁹⁷ or another search bias case and apply the advisor theory rather than the editor theory, the result would likely be the same. Martin would have to prove that Google provided a subjectively dishonest result for the ranking to be actionable in tort.¹⁹⁸ The result in Martin's case would be the same not because the court would again inadvertently conflate the two types of opinions present, but because "it will generally be impossible for a court to conclude that Google's assertions of relevance are wrong."¹⁹⁹ This conclusion would result "because of the diversity of users' (normative) opinions and the difficulty of measuring them, rather than because of the expressivity of Google's (descriptive) opinions."²⁰⁰

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 925.

¹⁹⁵ *Id.* at 925.

¹⁹⁶ *Id.*

¹⁹⁷ See *supra* Part III.B.

¹⁹⁸ Grimmelman, *supra* note 9, at 925.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

It is possible however, that in cases challenging “search engines’ obligations in dealing with repressive authoritarian governments,”²⁰¹ such as *Zhang*, a different result could be reached under the advisor theory. Some view the *Zhang* suit as nothing more than “a political protest over Chinese censorship, [with] the battle . . . being waged by proxy against a private entity allegedly complying with its government’s laws.”²⁰² Those viewing *Zhang* as a mere proxy battle argue that, rather than bringing “private lawsuit[s] against . . . commercial actor[s]” to fix government censorship, “[b]etter mechanisms would be to keep encouraging the Chinese government to rethink its policies, and to encourage the development of pro-freedom technologies that give Chinese Internet users more choices.”²⁰³ They note that, worse still, “the lawsuit’s underlying objective [was] to export our free speech norms to China.”²⁰⁴ But this argument also fails to view a search from the users’ eyes; it follows the path of the editor theory in viewing search from the search engine’s perspective by arguing that Baidu was “allegedly complying with its government’s laws.”²⁰⁵ And when the plaintiffs in *Zhang* alleged that Baidu “conspire[d] to prevent ‘pro-democracy political speech’ from appearing in its search-engine results here in the United States,” they were not attempting to “export our free speech norms to China,” they were seeking to enforce them here.²⁰⁶ The advisor theory could have offered a more exacting result.

In *Zhang*, the District Court for the Southern District of New York mistakenly applied the editor theory, discarded the conduit theory, and disregarded the advisor theory’s contention that the two can coexist.²⁰⁷ When the court disregarded *Turner’s* three-prong

²⁰¹ *Id.* at 950.

²⁰² Eric Goldman, *Of Course the First Amendment Protects Baidu’s Search Engine, Even When it Censors Pro-Democracy Results*, FORBES (MAR 28, 2014, 03:31 PM), <http://www.forbes.com/sites/ericgoldman/2014/03/28/of-course-the-first-amendment-protects-baidus-search-engine-even-when-it-censors-pro-democracy-results/>.

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Jian Zhang v. Baidu.com Inc.*, 10 F. Supp. 3d 433, 435 (S.D.N.Y. 2014); Goldman, *supra* note 202, at 5.

²⁰⁷ *See Zhang*, 10 F. Supp. 3d at 436–38.

analysis, it shunned the conduit theory. When it looked to *Tornillo* and *Hurley* and determined that a “search engine’s editorial judgment is much like many other familiar editorial judgments,’ such as the newspaper editor’s judgment,”²⁰⁸ it accepted the editor theory on its face and forgot that unlike newspapers, search engines are interactive. While it may be true that search engines exercise those same editorial decisions, newspapers do not generate them “on the fly,’ in response to a [reader’s] specific” interest at that exact moment the way search engines do.²⁰⁹ “Impulse. Response. Fluid. Imperfect. Patterned. Chaotic.”²¹⁰ This simple difference makes the analogy seem strained. Had the court been less eager to focus on *what* the search engine was *doing* or *saying*, and placed more emphasis on *how* the users were searching, it could have promoted the users’ fundamental right to “seek” information, which involved more than the “mere access to raw information, but also the ability to sort through it.”²¹¹

In the end though, the advisor theory, relying on some form of regulation, is satisfied by the existence of other search engines by which the plaintiffs in *Zhang* could find their publications online. Even if the plaintiffs want their publications to appear on Baidu’s search results, the advisor theory is more concerned that “the government [can] take steps to ensure that users are affirmatively able to make use of good and diverse search engines,” not diverse results on *every* search engine.²¹² This notion accurately reflects that the users’ interest is put first, ensuring that the ability to seek information is not hindered by a search engine’s judgment. The availability of a multitude of search engines adequately satisfies the advisor theory’s concern that users can sort through all of the raw information that a search engine provides access to. The advisor theory is not interested in compelling Baidu’s speech in the interest of the plaintiffs; it is concerned with the plaintiffs having some access to the information they seek, whether through one advisor or another.

²⁰⁸ *Id.* at 437–38 (citing Benjamin, *supra* note 68, at 1458–72; Volokh & Falk, *supra* note 45 at 884–92).

²⁰⁹ Grimmelman, *supra* note 9, at 895.

²¹⁰ EX MACHINA (Film4 & DNA Films 2015).

²¹¹ Grimmelman, *supra* note 9, at 897.

²¹² *Id.* at 902.

VI. CONCLUSION

The most important point the advisor theory advocates is that courts, too, put users' interests first when deciding cases involving First Amendment protections for search engine search results. Now that oil has been struck, the internal combustion engine must be properly designed to make use of it. To have the courts continue to view First Amendment protections through the eyes of the search engine is to always find for the search engine. Courts must begin to rein in the power of search engines by considering search engine speech through the eyes of the user and the user's opinion of what is relevant. This is the only way an *Ex Machina*, all-powerful search engine future can be prevented.